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No. 95-_____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

ENRIQUE RUVALCABA,

Petitioner,

vs.

CITY OF LOS ANGELES, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN C. BURTON, *Counsel of Record*
BURTON & NORRIS
ATTORNEYS FOR PETITIONER
35 South Raymond Avenue, Suite 405
Pasadena, California 91105
Telephone: (818) 449-8300

43 pp

QUESTION PRESENTED

Whether the Court of Appeals erroneously expanded the holding of *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), which allows police officers to order automobile drivers out of their vehicles during traffic stops, to automobile passengers, where there is no suspicion of criminal activity other than an alleged minor traffic violation by the driver?

LIST OF PARTIES

Petitioner Enrique Ruvalcaba was plaintiff and appellant in the courts below. Respondents City of Los Angeles, Daryl F. Gates, John Schiffner, David Jacoby and John Backus were the defendants and respondents in the courts below.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

ENRIQUE RUVALCABA,

Petitioner,

vs.

CITY OF LOS ANGELES, *et al.*,

Respondents.

Petitioner Enrique Ruvalcaba respectfully prays that a writ of certiorari issue to review the judgment of the trial court entered October 6, 1993, and the opinion of the United States Court of Appeals for the Ninth Circuit, filed on August 29, 1995, affirming that judgment.

OPINION BELOW

The decision of the Court of Appeals was reported at 64 F.3d 1323, and is attached hereto as Appendix A. No opinion was rendered by the District Court for the Central District of California. The judgment of the district court appears as Appendix B.

JURISDICTION

The decision of the Court of Appeals for the Ninth Circuit affirming the judgment was filed on August 29, 1995. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on November 3, 1995. Appendix C. This petition for certiorari was filed February 1, 1996, 90 days within November 3, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Proceedings Below

Enrique Ruvalcaba filed a 42 U.S.C. § 1983 action against the City of Los Angeles, its former Chief of Police Daryl F. Gates, and three Los Angeles Police Department (LAPD) officers for money damages based on allegations of excessive force and false arrest. Federal jurisdiction was invoked pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343(3) (civil rights). The trial court bifurcated Mr. Ruvalcaba's claims against the City and former Chief Gates from his claims against the individual officers, and then conducted a five-day jury trial on the issue of the officers' liability. Following a defense verdict, the trial court entered judgment in favor of all defendants. Mr. Ruvalcaba appealed. The Ninth Circuit affirmed.

2. Statement of Facts

The essential facts are not in dispute. During the early morning hours of February 28, 1991, petitioner Enrique Ruvalcaba and his friend Salvador Haro were riding in a car driven by petitioner's brother Victor Ruvalcaba. Two LAPD officers, David Jacoby and John Backus, pulled Victor Ruvalcaba over because of a supposed failure to stop for a posted stop sign. Before the stop, the officers had no information that the car or any of the men in it were involved in any crime. Moreover, the officers had determined the vehicle had not been reported stolen.

The officers ordered the men out of the car for a pat down search. All three complied, but once petitioner was outside, an altercation ensued. The officers struck petitioner with their billy clubs, injuring his arm and leaving a large gash in his forehead. A backup officer who arrived after the fight sent a computer message stating: "Arrestee knocked unconscious with gaping head wound . . . Routine."

After spending more than two months in jail awaiting trial, petitioner pled nolo contendere to a violation of Section 2800 of the California Vehicle Code, failure to obey a lawful order, and was released. Meanwhile, the driver, Victor Ruvalcaba, was never ticketed for the supposed traffic offense.

REASON FOR GRANTING THE WRIT

The Court Should Decide Whether the Fourth Amendment Allows Police Officers to Order Passengers Out of Cars Whenever the Driver Is Detained for a Routine Traffic Citation.

1. The Conflict in the Lower Courts.

In its opinion below, *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323 (9th Cir. 1995), the Ninth Circuit Court of Appeals rejected petitioner's argument that the officers ordering him from the car violated his Fourth-Amendment right to be free from a suspicionless seizure. By a 2-1 vote, it held—for the first time by any federal appellate court—that automobile *passengers* can be ordered out without any individualized suspicion or need whenever the *driver* is detained for a traffic stop, no matter what the circumstances or how trivial the driver's alleged infraction.[1]

This Court held in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (per curiam), that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the *driver* to get out of the vehicle without violating the Fourth Amendment[]." *Id.*, at 111 n.6, 98 S.Ct. at 333 n.6

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[1]Judge James M. Burns' separate opinion is labeled a "Partial Concurrence and Partial Dissent." He disagreed expressly, however, with the question presented, writing that he did "not concur with the majority's establishment of a bright-line rule that permits an officer to routinely order all occupants to exit a vehicle legally stopped for a traffic violation." 64 F.3d at 1329.

(emphasis added). The Ninth Circuit expanded that ruling: "Wh0ile we agree with Ruvalcaba that *Mimms* does not control the outcome, we believe that the reasoning behind *Mimms* is equally applicable to passengers in a vehicle as it is to drivers." 64 F.3d at 1327 (footnote omitted).

The day following the filing of the Ninth Circuit opinion in *Ruvalcaba*, the Court of Special Appeals of Maryland issued a remarkably scholarly opinion surveying most of the existing precedent and carefully balancing the competing interests involved on this same question. *State v. Wilson*, 106 Md.App. 24, 664 A.2d 1 (1995), *cert. denied* 340 Md. 502, 667 A.2d 342 (1995). It rejected the contention that drivers and passengers should be treated alike, and concluded that *Mimms* should not be extended to passengers.

The split between *Ruvalcaba* and *Wilson* mirrors the sharp conflict which already existed among the state courts, with many decisions by courts of last resort on each side of the question—often with passionate dissents. In addition to Maryland, the following states reject the view that *Mimms* applies to passengers: California, *People v. Maxwell*, 206 Cal.App.3d 1004, 1008-10, 254 Cal.Rptr. 124, 126-28 (1988)[2]; Iowa, *State v. Becker*, 458 N.W.2d 604, 607 (Iowa 1990) ("Further intrusion on the passenger is not justified . . . unless some articulable suspicion exists concerning a violation of law by that person, or unless further interference with the passenger is required to facilitate a lawful arrest of another person or lawful search of the vehicle."); New Jersey, *State v. Smith*, 134 N.J. 599, 616, 637 A.2d 158, 166 (1994) ("[T]he scale tips against a per se rule that a passenger may always be ordered out."); Pennsylvania, *Commonwealth v. Elliott*, 376 Pa.Super. 536, 549, 546 A.2d 654, 660 (1988); Tennessee, *Johnson v. Tennessee*, 601 S.W.2d 326, 328 (Tenn. App. 1980) ("The police

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[2]In addition, California holds an order *prohibiting* a passenger from leaving the car during a traffic stop to be a detention requiring individualized suspicion. *People v. Gonzalez*, 7 Cal.App.4th 381, 8 Cal.Rptr.2d 640 (1992).

officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries."); Utah, *State v. Schlosser*, 774 P.2d 1132, 1135 n. 3 (Utah 1989) (dicta); and Virginia, *Bethea v. Commonwealth*, 245 Va. 416, 419, 429 S.E.2d 211, 213 (1993) (declining to extend *Mimms* given facts presented).

The states extending *Mimms* to passengers include Florida, *Doctor v. State*, 573 So.2d 157, 159 (Fla. 1991); Illinois, *People v. Salvator*, 236 Ill. App. 3d 824, 840, 602 N.E.2d 953, 963 (Ill. App. 1992), *appeal denied* 148 Ill.2d 651, 610 N.E.2d 1273 (1993); Indiana, *Warr v. State*, 580 N.E.2d 265, 267, (Ind. App. 1991); Michigan, *People v. Martinez*, 187 Mich.App.160, 167, 466 N.W.2d 380, 383 (1991) (2-1 decision), *vacated* 439 Mich. 986, 483 N.W.2d 868 (1992); Minnesota, *State v. Ferrise*, 269 N.W.2d 888, 890 (Minn. 1978) (three-judge dissent); North Dakota, *State v. Gilberts*, 497 N.W.2d 93, 96 (N.D. 1993) (passenger ordered out incident to *arrest* of driver); and Rhode Island, *State v. Soares* 648 A.2d 804, 806 (R.I. 1994). After first skirting the issue in *People v. McLaurin*, 70 N.Y.2d 779, 781, 515 N.E.2d 904, 905, 521 N.Y.S.2d 218, 219-20 (1987), New York extended *Mimms* to passengers over the vigorous dissent of three judges. *People v. Robinson*, 74 N.Y.2d 773, 543 N.E.2d 733, 545 N.Y.S.2d 90, *cert. denied* 493 U.S. 966, 110 S.Ct. 411, 107 L.Ed.2d 376 (1989).[3] Louisiana's high court initially refused to extend *Mimms* to passengers, *State v. Williams*, 366 So.2d 1369, 1374 (La. 1978), but then overruled itself over the dissent of two judges. *State v. Landry*,

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[3]According to the *Robinson* dissent,

> Although the [United States] Supreme Court has not, to date, pronounced so total an evisceration of the Fourth Amendment's protections against warrantless searches and seizures, the majority of this court sweeps away entirely those protections in respect to the occupants of a lawfully stopped vehicle, proclaiming that the seizure of such occupants is per se reasonable based upon the risks inherent in "police/civilian vehicle encounters."

74 N.Y.2d at 776, 543 N.E.2d at 734, 545 N.Y.S.2d at 91.

588 So.2d 345 (La. 1991).

The issue obviously is of great importance; its resolution affects the privacy rights of everyone who travels by motor vehicle. At present, the Fourth-Amendment rights of an auto passenger on a cross-country trip may change at the state line. Accordingly, a writ of certiorari to the Ninth Circuit Court of Appeals should issue pursuant to Sup. Ct. R. 10.1(a)(ii) (conflict with state court of last resort) and *id.* 10.1(c) (important question of federal law which should be settled by Supreme Court).

2. *Pennsylvania v. Mimms* Does Not Apply to Passengers.

While at first blush it might seem nit-picking not to extend *Mimms* to vehicle passengers, a close examination of the *Mimms* rationale shows it only applies to drivers.

Philadephia police officers pulled over Harry Mimms for expired plates and ordered him out of the car. When they noticed a bulge, they patted him down and found a revolver.[4] After noting that the legality of a Fourth-Amendment seizure "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers,'" 434 U.S. at 109, 98 S.Ct. at 330 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)), and finding "the driver was lawfully detained," *id.*, the Court balanced "the incremental intrusion resulting from the request to get out of the car," against "the safety of the officer" and upheld the order to alight. The driver experienced only a "mere inconvenience," not an unwarranted seizure, and the officer could conduct his business from the safety of the roadway's shoulder rather than in a traffic lane.

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[4]The opinion below refers to Harry Mimms as the car's "sole occupant," 64 F.3d at 1326, but he was not. 434 U.S. at 107, 98 S.Ct. at 331. There is no discussion regarding the role of the passenger, if any, in the ensuing events, however.

Commenting on *Mimms* and the distinction between drivers and passengers during traffic stops, Professor Wayne R. LaFave noted that the intermediary appellate decision in that case, which had held the extraction of the *driver* unlawful, was itself based on an opinion, *Commonwealth v. Pollard*, 450 Pa. 138, 299 A.2d 233 (1973), holding the extraction of a *passenger* to be beyond the Pale.

> *Pollard* was correctly decided and ought to be distinguished from *Mimms*. For one thing, it may fairly be said that "an operator's expectation of privacy differs from that of an occupant of a vehicle detained for a traffic violation," as the driver is detained for some violation by him or the car he is driving, while the detention of the passengers is no more than an inevitable incident of the stopping of the car. But more important, the potential danger to police engaged in traffic enforcement could be adequately met if the police allowed passengers to remain in the stopped vehicle and instead had the driver accompany them to the police vehicle while the citation is prepared.

W.R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4 (2d Ed. 1987).

Prior to *Ruvalcaba* there was no federal appellate decision holding that the *Mimms* rule extends to passengers.[5] There has been, however, a certain amount of confusion in the Courts of Appeal generated by imprecise statements of the *Mimms* rule. The Court itself may have contributed to this confusion when it stated, in dicta, that

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[5]There is also no decision of the Court of Appeals holding that officers do not have discretion to order passengers out of cars during routine traffic stops. The sole federal authority other than *Ruvalcaba* squarely addressing the question is a published district court decision holding that the *Mimms* rule applies to passengers too. *United States v. McCoy*, 824 F.Supp 467, 473-74 (D.Del. 1993).

Mimms "held that police may order *persons* out of an automobile during a stop for a traffic violation." *Michigan v. Long*, 463 U.S. 1032, 1047-48, 103 S.Ct. 3469, 3480, 77 L.Ed.2d 1201 (1983) (emphasis added).[6] *Mimms*, of course, held only that the police may order *drivers* out of an automobile during a stop for a traffic violation.

The *Ruvalcaba* court's claim, 64 F.3d at 1327 n. 3, that the Ninth Circuit "previously noted cursorily that *Mimms* should be extended to apply to '[o]ccupants of a lawfully detained motor vehicle,'" in *United States v. Wiga*, 662 F.2d 1325, 1332-33 (9th Cir. 1981), is incorrect, resting only on language which, the dissent notes, "cursorily and inexactly generalized the *Mimms* holding in dictum." 64 F.3d at 1329. Federal agents were pursuing a felony parole violator driving a motor home. When stopped, and *arrested*,[7] the defendant driver denied there was anyone inside; however, the agents had seen someone enter the vehicle earlier. The denial of the driver's motion to suppress evidence seized during the "protective sweep" of the motor home incident to his felony arrest was affirmed. There was no claim by the passenger that she was improperly ordered out, nor was there any discussion of whether police should be allowed to extract passengers whenever they please. There is only language overstating the *Mimms* holding: "*Occupants* of a lawfully detained motor vehicle may be routinely ordered out of the vehicle." *Id.* at 1332-33 (emphasis added).

The *Ruvalcaba* court's assertion that "[o]ther circuits have extended *Mimms* to apply to passengers in a vehicle," 64 F.3d at 1327 n. 3, is similarly incorrect. Indeed, to the extent the holdings cited bear on the question presented here, they tend to support the contrary

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[6]Justice Powell incorrectly stated in his concurrence to *Rakas v. Illinois*, 439 U.S. 128, 155, 99 S.Ct. 421, 436, 58 L.Ed.2d 387 (1978), that "this Court determined [in *Mimms*] . . . that passengers in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made."

[7]Arrests—as opposed to routine vehicle stops to issue traffic cititations—raise issues beyond the scope of the narrow question presented by this petition.

proposition—that the extraction of passengers during routine stops should be based on some sort of individualized suspicion or need, rather than the unbridled discretion of a police officer. For instance, in *United States v. Hardnett*, 804 F.2d 353 (6th Cir. 1986), *cert. denied* 479 U.S. 1097, 107 S.Ct. 1318, 94 L.Ed.2d 171 (1987), the officers were told that four men in the suspect car were armed and threatening someone.

> The Supreme Court has held that . . . "officers may, consistent with the Fourth Amendment . . . require a driver who commits a traffic violation to exit the vehicle even though they lack any particularized reason for believing the driver possesses a weapon." *New York v. Class*, [475 U.S. 106], 106 S.Ct. 960, 967, 89 L.Ed.2d 81 (1986). *See also*, *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). If so, then officers certainly may also order occupants out of a car *when they have a particularized suspicion* that the occupants are armed.

Id. at 358 (emphasis added).[8]

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[8] *United States v. Tellez*, 11 F.3d 530 (5th Cir. 1993), presented a particularized need for the passenger to be removed. Three men were sitting on a front bench seat in a pickup truck. The passenger next to the right-side door was ordered out of the truck so that the officers could view the passenger in the middle. The officers were not attempting to search or investigate the passenger ordered out, but needed to move him so they could confirm whether the middle passenger was a particular parole violator wanted by the police. *See also United States v. Cummins*, 920 F.2d 498, 502 (8th Cir. 1990), *cert. denied* 502 U.S. 962, 112 S.Ct. 428, 116 L.Ed.2d 448 (1991) (order that passenger alight permissible because of suspicious circumstances).

The remaining decisions cited in Footnote 3 of *Ruvalcaba* have nothing to do with ordering passengers out of cars during routine traffic stops. *United States v. Powell*, 929 F.2d 1190 (7th Cir.), *cert. denied* 502 U.S. 981, 112 S.Ct. 584, 116 L.Ed.2d 609 (1991), turned on whether a vehicle owner had standing to challenge a vehicle stop and search at which he was not present. In *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993), the officers asked the *driver* "to step to the rear of the vehicle," while the *passenger* "remained in the vehicle." *Id.* at 433.

There is a district court decision arising from within the Ninth Circuit holding that "reasonable precautionary measures to ensure [officer] safety while effecting a routine traffic stop . . . do not include ordering the occupants out of the car at gunpoint and patting them down." *United States v. Daniel*, 804 F. Supp. 1330, 1335 n.10 (D. Nev. 1992). In reaching this conclusion, the court stated the obvious:

> When a police officer effects an automobile stop on the ground that the driver has violated a traffic law, the scope of the resultant detention is strictly limited to the enforcement of that law. . . . An officer conducting a traffic stop may detain the motorist so long as is necessary to check his driver's license and registration, ask a few perfunctory questions, and write out a ticket. Any expansion of the scope of the stop to include investigation of other suspected illegal activity will only be allowed if the officer has a reasonable, articulable suspicion that other criminal activity is afoot.

Id. at 1334 (citations omitted). Following this basic principle here means holding that an officer cannot order a passenger out of a car during a routine traffic stop of the driver, unless there exists some legitimate reason to do so.

3. The Balancing Test: Officer Safety Versus the Intrusion on the Individual

The *Ruvalcaba* court's *only* justification for permitting officers unlimited discretion to order passengers out of cars during routine traffic stops is that concerns for "officer safety" outweigh "this *de minimus* intrusion into a vehicle occupant's liberty." 64 F.3d at 1327. It performs the balance in only the most cursory manner, however, carving out a broad exception to the Fourth Amendment's general requirement of "individualized suspicion" without carefully examining the contents on each side of the scale.

The opinion does not explain how safety is promoted by compelling passengers to get out of cars rather than leaving them inside, other than by suggesting that a "'weapon can be concealed under the seat of a vehicle.'" *Id.* at 1327 (quoting *United States v. Salas*, 879 F.2d 530, 535 (9th Cir.), *cert. denied* 493 U.S. 979, 110 S.Ct. 507, 107 L.Ed.2d 509 (1989). But *Mimms* does not limit its officer safety concerns to shootouts suddenly arising out of innocuous traffic stops; it addresses a much more common, albeit mundane, risk—one applicable only to drivers:

> The hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle may also be appreciable in some situations. Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both.

Mimms, 434 U.S. at 111, 98 S.Ct. at 333.

The *Ruvalcaba* court asserts that "[h]aving all occupants step out of the vehicle protects the safety of the officer while the officer is dealing with the driver regarding the traffic violation," 64 F.3d at 1327, but there is no evidence in the record—such as the testimony of experts in police tactics—to support this statement, and common sense dictates that would not be so.[9] Traffic stops are often accomplished by a single officer, sometimes two. Cars themselves provide confinement. The passengers will generally be seated in a cramped space facing forward. The officer can order the driver out—pursuant to *Mimms*—and to the rear if he is concerned about a threat from the passengers. Having the passengers outside the car creates additional possibilities for unpleasant confrontations—such as the one which occurred here—and moves them to unsecured positions where they could, if so inclined, more easily create mischief while the officer is distracted by the task at hand, writing a traffic citation for the driver.

The Maryland Court of Special Appeals balanced the competing interests and came to the opposite conclusion.

> A balancing process . . . is an exercise in relativity. A cost-benefit analysis requires that we compare the social "costs" to driver and passenger, respectively, just as we have compared the respective benefits of protecting the officer from each of them. It is here that the parallel [with *Mimms*] falters. It is here that a significantly heavier weight on the "cost" side of the scale in the case of a mere passenger produces, in our judgment, a different result.
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> . . . .

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[9]In his *Mimms* dissent, Justice Stevens called the majority's "assumption about police safety . . . dubious at best," *Mimms*, 434 U.S. at 117, 98 S.Ct. at 337, and quoted law enforcement authorities which instruct officers to try to keep drivers in the car during traffic stops, rather than extracting them. *Id.* at 119 n. 10, 98 S.Ct. at 337 n. 10.

Apparently critical to the Supreme Court's decision that a police officer's prerogative to order a stopped driver out of a car could be automatic rather than conditioned on some showing of particularized suspicion was its conclusion that the social "cost" in terms of interfering with the driver's liberty interest was minimal, if not nugatory. Not only is the automobile itself stopped for a traffic infraction, but the driver is subject to further detention on an in personam basis. The driver is not permitted to walk away from the scene and disappear into the sunset. The driver is required to furnish the officer with evidence of a valid operator's license and valid registration for the vehicle, subject to penalties for failure to do so. The driver is further detained while the officer checks out the identifying data over a police radio. The driver is subject to receiving a traffic ticket or citation, if not, indeed, to custodial arrest for the infraction. All this is well settled law before the *Pennsylvania v. Mimms* considerations even come into play. With the detention of the driver already an undisputed fait accompli, the small incremental intrusion of having him alight from the vehicle while being detained was considered by the Supreme Court to be absolutely de minimis.

. . . .

A police interference with the presumptively unfettered liberty of a mere passenger, by contrast, cannot so easily be dismissed as "de minimis" or as something "hardly ris[ing] to the level of a petty indignity." The passenger has not committed any wrongdoing, even at the level of a traffic infraction. The passenger may not be issued a traffic ticket or

citation, let alone subjected to custodial arrest. The passenger is not required to furnish identification or any other documentation. Once the automobile has slowed down sufficiently for the passenger safely to alight, moreover, the passenger is subject to no mandatory detention whatsoever. The passenger is presumptively free to abandon the driver to the clutches of the law and to hail a cab.

Under the circumstances, a police intrusion on the Fourth Amendment interest of the passenger is not so minimal or merely incremental as to be of no more than slight significance in the weighing operation. To order a passenger to stay in the car or to get out of the car is the imposition of detention per se, and not a mere shift of the location of already established detention.

The interest in officer safety, to be sure, continues to loom large, and this is admittedly a close question. All warrantless activity, however, is presumptively invalid, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Coolidge v. New Hampshire*, 403 U.S. 433, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), and the burden is on the State to persuade us that it is reasonable. The State has not persuaded us that the automatic police prerogative, under *Pennsylvania v. Mimms*, to order a driver out of a vehicle should be extended to a passenger—on an automatic basis.

State v. Wilson, 106 Md.App. at 42-44, 664 A.2d at 9-10.

Even though the proliferation of firearms poses an obvious danger to everybody—not just police officers—the Fourth Amendment, through *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its progeny, prohibits discretionary, suspicionless searches of people and places for weapons. In other words, the Fourth-Amendment search and seizure rules should not be different because Enrique Ruvalcaba was seated in a car rather than walking down a sidewalk when the officers detained his brother for an inconsequential infraction. It should be the same. And the rules should be the same rules throughout the United States.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: February 1, 1996

John C. Burton, *Counsel of Record*
BURTON & NORRIS
Attorneys for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ENRIQUE RUVALCABA,
Plaintiff-Appellant,

v.

CITY OF LOS ANGELES; DARRYL GATES, Police Chief; JOHN SCHIFFNER; JOHN BACKUS, et al.,
Defendants-Appellees.

No. 93-56609

D.C. No. CV-91-04184-LEW(E)

OPINION

Appeal from the United States District Court
for the Central District of California
Laughlin E. Waters, District Judge, Presiding

Submitted* May 1, 1995
Pasadena, California

Filed August 29, 1995

Before: Robert R. Beezer and Stephen S. Trott, Circuit Judges, and James M. Burns, Senior District Judge.**

Opinion by Judge Beezer; Partial Concurrence and Partial Dissent by Judge Burns

*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

**The Honorable James M. Burns, Senior United States District Judge for the District of Oregon, sitting by designation.

SUMMARY

Individual Rights/Civil Rights/Constitutional Rights

The court of appeals affirmed district court orders. The court held that once a police officer has lawfully stopped a vehicle for a traffic violation, the officer may, consistent with the Fourth Amendment and despite the absence of probable cause or reasonable suspicion of criminal activity, order all of the vehicle's occupants to step outside.

Appellees John Backus and David Jacoby, police officers for appellee the City of Los Angeles, noticed a vehicle fail to stop at a stop sign. Backus recognized one of the three occupants as appellant Enrique Ruvalcaba, with whom Backus had prior contacts. When the officers activated their flashers, the vehicle's driver turned onto a poorly lit side street and stopped. The officers directed the three occupants to step outside and walk over to the sidewalk. The driver and one occupant complied, but Ruvalcaba did not cooperate. Instead, Ruvalcaba jumped out of the vehicle and began swearing at the officers. Ruvalcaba moved toward the officers and a violent struggle ensued. Ruvalcaba was injured.

Ruvalcaba filed a civil rights suit against the officers, the City and others seeking money damages. In the trial of the suit against the individual officers, Ruvalcaba moved for judgment as a matter of law on the ground that the officers illegally seized him when they directed that he exit the vehicle. The district court denied the motion. The jury returned a verdict in favor of the officers. Ruvalcaba moved for a new trial on the ground that the district court erred in permitting Backus and Jacoby to testify about their knowledge of Ruvalcaba's criminal history. The court denied the motion. Ruvalcaba appealed the denial of his two motions.

[1] In *Pennsylvania v. Mimms*, the Supreme Court held that a police officer as a routine practice may order the driver to

step out of a lawfully detained motor vehicle. [2] The reasoning behind *Mimms* is equally applicable to passengers in a vehicle as it is to drivers. [3] The primary basis behind the governmental interest in *Mimms* was the danger to police officers when confronting a driver seated in an automobile. That danger is equally grave when an officer confronts passengers. [4] The intrusion into a passenger's liberty is minimal. The mere order to exit the vehicle is insignificant. [5] The balance of interests in this case weighed heavily in favor of police officers. Once an officer has lawfully stopped a vehicle for a traffic violation, the officer may, consistent with the Fourth Amendment and despite the absence of probable cause or reasonable suspicion of criminal activity, order all of the vehicle's occupants to step outside.

[6] The officers' conduct challenged on appeal in this case was *per se* reasonable. Under the Fourth Amendment, the *de minimis* intrusion into a vehicle occupant's liberty is permitted. [7] Thus, the district court properly denied Ruvalcaba's motion for judgment as a matter of law.

[8] The district court properly allowed Backus and Jacoby to testify about the facts known to them regarding Ruvalcaba's criminal past. [9] Thus, the district court did not abuse its discretion when it denied Ruvalcaba's motion for a new trial.

Senior District Judge Burns concurred in part and dissented in part, disagreeing with the establishment of a bright-line rule permitting an officer to routinely order all occupants to exit a vehicle that is legally stopped for a traffic violation.

COUNSEL

John C. Burton, Burton & Norris, Pasadena, California, for the plaintiff-appellant.

Janet G. Bogigian, Office of the City Attorney, Los Angeles, California, for the defendants-appellees.

OPINION

BEEZER, Circuit Judge:

In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), the United States Supreme Court held that once a motor vehicle has been lawfully detained for a traffic violation, police officers may order the driver to get out of the vehicle without violating the Fourth Amendment. Today, we must decide whether to extend this holding to cover all passengers in a motor vehicle.

Enrique Ruvalcaba appeals the district court's denial of his motion for a judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, and his motion for a new trial pursuant to Federal Rule of Civil Procedure 59. He argues: (1) that police officers conducted an illegal seizure when they ordered him out of a vehicle in which he was a passenger; and (2) that the district court erred in permitting police officers to testify about their knowledge of Ruvalcaba's criminal history.

We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we are persuaded that the Supreme Court's holding in *Mimms* should be extended to passengers, we affirm.

I

Los Angeles Police Officers John Backus and David Jacoby were on duty during the early morning hours of February 28, 1991 when they noticed a vehicle fail to stop at a stop sign.[1] The officers began to follow the vehicle, and Officer

[1]Because the jury returned a verdict in favor of the officers, we accept their version of the events that took place.

Backus recognized one of the three occupants as Enrique Ruvalcaba. Officer Backus was familiar with Ruvalcaba from a variety of prior contacts. Due to this familiarity, he anticipated the possibility of danger in stopping the vehicle.

When the officers activated their flashers, the driver of the vehicle turned onto a poorly lit side street and stopped. The officers approached the vehicle cautiously and directed the three occupants to step outside and walk over to the sidewalk. The driver, who turned out to be Enrique Ruvalcaba's brother, Victor, complied with the officers' direction as did another occupant of the vehicle, Salvador Haro.

Enrique Ruvalcaba did not cooperate. Instead, he jumped out of the vehicle and began swearing at the officers. Ruvalcaba then moved toward the officers in a threatening manner.[2] Officers Jacoby and Backus proceeded to subdue Ruvalcaba by using their batons. A violent struggle ensued, and Ruvalcaba suffered injuries.

Ruvalcaba filed a civil rights suit under 42 U.S.C. § 1983 against Officers Backus and Jacoby, Officer John Schiffner, the City of Los Angeles, and Police Chief Darryl F. Gates (collectively "City"), seeking money damages. The trial was bifurcated, and Ruvalcaba's suit against the individual officers proceeded to trial first. Ruvalcaba moved for judgment as a matter of law on grounds that the police officers illegally seized him when they directed that he exit the vehicle. The district court denied the motion.

The jury returned a verdict in favor of the officers. Ruvalcaba then moved for a new trial on grounds that the district court erred in permitting Officers Backus and Jacoby to testify about their knowledge of Ruvalcaba's criminal history. The district court denied this motion as well.

[2]For the sake of clarity, Ruvalcaba will hereinafter refer to Enrique Ruvalcaba.

II

We review de novo the district court's denial of a motion for judgment as a matter of law. *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, 113 S. Ct. 815 (1992). We review for abuse of discretion a district court's denial of a motion for a new trial. *Larson v. Neimi*, 9 F.3d 1397, 1398 (9th Cir. 1993).

III

Ruvalcaba first argues that the district court erred in denying his motion for judgment as a matter of law. He contends that the police officers violated his rights under the Fourth Amendment when they, without cause, ordered him to step out of the vehicle in which he was riding as a passenger. Because this seizure was illegal as a matter of law, Ruvalcaba argues, no reasonable juror could have returned a verdict in favor of the officers.

At the outset, it is important to note what is not at issue in this case. Ruvalcaba does not contest on appeal the legality of the routine traffic stop. We therefore need not examine the reasons for which Officers Jacoby and Backus stopped the Ruvalcaba vehicle. Ruvalcaba also raises no challenge to the reasonableness of the police officers' use of force after he stepped out of the vehicle. As the jury has already done so, we need not pass judgment on those events. Finally, Ruvalcaba does not argue that the police officers conducted any unconstitutional pat-down search or frisk after he left the vehicle. The issue Ruvalcaba does raise directly is whether Officers Jacoby and Backus violated the Fourth Amendment when they ordered him to step out of the vehicle.

The Fourth and Fourteenth Amendments to the United States Constitution prohibit state officials from conducting unreasonable searches and seizures. *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386 (1995). When a police officer stops an

automobile and detains its occupants, that activity constitutes a "seizure" within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

Not all seizures, of course, violate the Fourth Amendment, only those that are unreasonable. *Vernonia*, 115 S. Ct. at 2390; *see United States v. Barona*, 56 F.3d 1087, 1091-93 n.1 (9th Cir. 1995) ("Reasonableness, not probable cause, is undoubtedly the touchstone of the Fourth Amendment."). Reasonableness is measured by balancing the nature of the intrusion into an individual's Fourth Amendment interests against "the public interest" or "legitimate governmental interests" at stake. *Vernonia*, 115 S. Ct. at 2390; *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

In determining the reasonableness of a police officer's order for an occupant to get out of a vehicle after a valid traffic stop, we do not write on a blank slate. In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), the Supreme Court confronted a similar case involving a police officer's traffic stop of a vehicle and its driver, the sole occupant. The Court framed the inquiry as whether "the order to get out of the car, issued after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment." *Id.* at 109. To answer its question, the Court focused on "the incremental intrusion resulting from the request to get out of the car." *Id.*

The Court first examined the public interest. Initially, the Court made clear that the police officer had no reason to suspect "foul play" from the particular driver, "there having been nothing unusual or suspicious about his behavior." *Id.* Rather, the police officer's routine practice was to order all drivers out of their vehicles after traffic stops. The Court held nevertheless that the state's interest in protecting officer safety was "both legitimate and weighty" and that this interest was enhanced by the officer's practice. *Id.* at 110. The Court rec-

ognized "the inordinate risk confronting an officer as he approaches a person seated in an automobile." *Id.*

Balanced against the state's interest, the Court weighed the intrusion into a driver's personal liberty of the order to step out of the vehicle after the vehicle had already been validly stopped for a traffic infraction. The Court concluded that the additional intrusion "can only be described as *de minimis*." *Id.* at 111. Later, the Court found additional ways to characterize the intrusion, including "hardly ris[ing] to the level of a 'petty indignity,' " and "a mere inconvenience." *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 17 (1968)).

[1] The Court concluded that the public interest in officer safety prevailed, holding that a police officer as a routine practice may order the driver to step out of a lawfully detained motor vehicle.

[2] Ruvalcaba contends that his situation is distinguishable from *Mimms* because he was a passenger in the vehicle, whereas Mimms was the driver. Ruvalcaba argues that "passengers have done no wrong, violated no laws, and there is no basis to deprive them of their liberty." While we agree with Ruvalcaba that *Mimms* does not control the outcome, we believe that the reasoning behind *Mimms* is equally applicable to passengers in a vehicle as it is to drivers.[3]

[3]We have previously noted cursorily that *Mimms* should be extended to apply to "[o]ccupants of a lawfully detained motor vehicle," but we did so without any balancing of interests of passengers. *See United States v. Wiga*, 662 F.2d 1325, 1332-33 (9th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982). *Wiga* is, of course, entirely consistent with the result we reach here.

Other circuits have extended *Mimms* to apply to passengers in a vehicle, most without significant analysis. *See United States v. Shabazz*, 993 F.2d 431, 437 n.7 (5th Cir. 1993); *United States v. Hardnett*, 804 F.2d 353, 358 (6th Cir. 1986), *cert. denied*, 479 U.S. 1097 (1987); *cf. United States v. Tellez*, 11 F.3d 530, 533 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1630 (1994); *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir.), *cert. denied*, 502 U.S. 981 (1991).

[3] The primary basis behind the legitimate and weighty governmental interest in *Mimms* was the danger to police officers when confronting a driver seated in an automobile. *See Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972) ("According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile."); *cf. Michigan v. Long*, 463 U.S. 1032, 1047 (1983) ("[I]nvestigative detentions involving suspects in vehicles are especially fraught with danger to police officers."). That danger is equally grave when a police officer confronts passengers; indeed, it may be more dangerous to have the driver outside the vehicle while one or more other passengers are left inside. One or more passengers may be seated in the back seat of a car, or the back of a sport utility vehicle, making it difficult, if not impossible, for the officer to keep a close watch on these passengers. *See United States v. Salas*, 879 F.2d 530, 535 (9th Cir.), *cert. denied*, 493 U.S. 979 (1989) ("A weapon can be concealed under the seat of a vehicle. It is readily accessible to be used to harm any police officer who approaches an automobile . . . ."). Having all occupants step out of the vehicle protects the safety of the officer while the officer is dealing with the driver regarding the traffic violation. We believe that the governmental interest weighs strongly in favor of permitting a police officer to order all occupants out of a vehicle.

[4] The intrusion into a passenger's liberty is minimal. The automobile has been stopped lawfully, and the passenger is, for the time being, going nowhere. As with the driver, "the only question is whether he shall spend that period sitting [in the car] or standing alongside it." *Mimms*, 434 U.S. at 111.

Two state courts have reached the same conclusion, after conducting careful and well-reasoned balancing of the interests at stake for passengers. *Michigan v. Martinez*, 466 N.W.2d 380, 383-84 (Mich. Ct. App. 1991), *appeal dismissed*, 480 N.W.2d 106 (Mich. 1992); *Louisiana v. Landry*, 588 So. 2d 345, 346-47 (La. 1991).

The passenger is not asked to expose any more of his person than is already exposed by virtue of being in the vehicle during the traffic stop. Of course, no additional intrusion into the passenger's liberty, such as a frisk or prolonged detention, may be justified by the traffic stop absent some additional suspicion. The mere order to exit the vehicle, however, is insignificant.

[5] The balance of interests in this case weighs heavily in favor of police officers. In the area of police confrontations with occupants of legally stopped vehicles, wide deference is appropriately granted to the officers' need for protection, especially when the intrusion is so minimal. We hold that once a police officer has lawfully stopped a vehicle for a traffic violation, the officer may, consistent with the Fourth Amendment and despite the absence of probable cause or reasonable suspicion of criminal activity, order all occupants of the vehicle to step outside.

Although we recognize that the driver, not the passengers, was the cause of the traffic stop, that fact does not alter the balance of interests. The weighty interest in officer safety is not dependent on the danger from the driver as a result of being stopped for a traffic violation, it is dependent on the inherent danger from approaching seated people in a vehicle, whether driver or passenger. Justice Stevens, dissenting in *Mimms*, recognized this logic. *Mimms*, 434 U.S. at 122 (Stevens, J., dissenting) ("Because the balance of convenience and danger is no different for passengers in stopped cars, the Court's logic necessarily encompasses the passenger.").

[6] Because we conclude that it is reasonable under the Fourth Amendment for police officers to direct all occupants of a vehicle to step out of their vehicle following a valid traffic stop, the officers' conduct challenged on appeal in this case was *per se* reasonable. We need not address the City's argument that Officers Backus and Jacoby had compelling reasons in this case to order Ruvalcaba out of the vehicle.

Indeed, the circumstances would have alarmed any officer: it was late at night, the Ruvalcaba car pulled onto a side street before stopping, and Officers Backus and Jacoby knew about some criminal history of at least one occupant. Whether, as in this case, police officers are confronted with multiple factors indicating danger, or whether the situation appears normal and benign, the Fourth Amendment permits this *de minimis* intrusion into a vehicle occupant's liberty.[4]

[7] The district court properly denied Ruvalcaba's motion for judgment as a matter of law.

IV

Ruvalcaba also argues that the district court erred in denying his motion for a new trial. He contends that Officers Backus and Jacoby were improperly permitted to testify about their knowledge of Ruvalcaba's criminal history. We disagree.

District courts are granted broad discretion in admitting evidence, and their rulings are reviewed only for an abuse of discretion. *United States v. Dunn*, 946 F.2d 615, 617 (9th Cir.), *cert. denied*, 502 U.S. 950 (1991). A new trial is only warranted when an erroneous evidentiary ruling "substantially prejudiced" a party. *United States v. 99.66 Acres of Land*, 970 F.2d 651, 658 (9th Cir. 1992).

The district court permitted the police officers to testify in a limited manner about their prior contacts with Ruvalcaba. This testimony was relevant to establish the facts and circumstances known to the officers during their confrontation with Ruvalcaba. In addressing an excessive force case under the Fourth Amendment, "the question is whether the officers'

[4]Police officers are, of course, not required to take this protective step. We merely hold that such a routine practice is permissible under the Fourth Amendment.

actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989).

[8] Keeping in mind that this trial involved the officers' alleged use of excessive force during the entire confrontation with Ruvalcaba, we conclude that the district court properly allowed the officers to testify about the facts known to them regarding Enrique Ruvalcaba's criminal past. The district court also properly admonished the jury to consider Ruvalcaba's prior bad conduct only in determining whether the officers' actions were reasonable under the circumstances. There was no abuse of discretion in admitting this evidence.

Neither did the district court's admission of the evidence run afoul of Federal Rule of Evidence 403. The district court is accorded broad discretion in determining whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Borunda v. Richmond*, 885 F.2d 1384, 1388 (9th Cir. 1988). The police officers' testimony was not so unfairly prejudicial as to warrant exclusion under Rule 403.

[9] The district court did not abuse its discretion in denying Ruvalcaba's motion for a new trial.

AFFIRMED.

BURNS, Senior District Judge, CONCURRING in Part and DISSENTING in Part:

Although I agree that the district court's denial of Ruvalcaba's motion for judgment as a matter of law and motion for new trial was proper under the circumstances particular to this case, I do not concur with the majority's establishment of a

bright-line rule that permits an officer to routinely order all occupants to exit a vehicle legally stopped for a traffic violation.

As the majority states, in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the Supreme Court held that an officer may routinely ask the driver to exit a vehicle lawfully stopped for a traffic violation because the officer's safety is always a matter of concern under those circumstances. The *Mimms* Court weighed the public's interest in allowing an officer to take precautionary safety measures when he confronts a driver for a traffic violation against "the individual's right to personal security free from arbitrary interference by law officers." *Id.* at 109. The Court concluded the officer's safety takes precedence under these circumstances because the additional intrusion is *de minimis* when an officer asks the driver, a person already lawfully detained because he violated a law, to exit a lawfully stopped vehicle.

The Court did not, however, generalize its holding to embrace all occupants of a vehicle. In fact, the Court's reasoning was geared directly and specifically to the inherent and potential risk arising from the interaction between an officer and a driver during a stop for a traffic violation:

(1) "[W]e . . . recognize[ ] the inordinate risk confronting an officer as he approaches a person seated in an automobile." *Id.* at 110.

(2) "Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements . . . ." *Id.*

(3) "The hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle may also be appreciable in some situations." *Id.* at 111.

(4) "Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the

driver of the vehicle to step out of the car and onto the shoulder of the road where the inquiry may be pursued with greater safety to both." *Id.*

The *Mimms* Court, in essence, concluded that an officer's safety is *per se* at risk during a traffic stop even though the driver's offense may be minor because of (1) the physical juxtaposition of officer, driver, car, and passing traffic; and (2) the confrontation that inevitably takes place between a driver and an officer during a traffic stop. These factors, however, may not necessarily exist in relation to other occupants of the vehicle; thus, the blanket balancing test the *Mimms* Court performed to establish a *per se* rule permitting an officer to routinely ask the driver to exit a vehicle lawfully stopped for a traffic violation may not fit well when "passenger" is substituted for "driver." A passenger, for example, may well be detained inadvertently and unavoidably during a routine stop for a traffic violation. Unlike the driver, who "owns" the unlawful conduct, the passenger may have done no more than unluckily place himself in the hands of a negligent driver. The passenger does not become an active participant in the stop unless criminal activity is suspected; thus, a passenger is not routinely approached nor confronted face-to-face by the officer. Also, the officer's exposure to "the hazard of accidental injury from passing traffic" during a traffic stop is not a risk associated with a passenger since traffic generally passes on the driver's side.

Just as the *Mimms* Court did not extend its *per se* rule to encompass all occupants of a vehicle, neither has the Ninth Circuit until now. In the past, this Circuit, like others, has only cursorily and inexactly generalized the *Mimms* holding in dictum. *See, e.g., United States v. Wiga*, 662 F.2d 1325, 1332-33 (9th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982) ("Occupants of a lawfully detained motor vehicle may be routinely ordered out of the vehicle" pursuant to *Mimms*); *United States v. Shabazz*, 993 F.2d 431, 437 n.7 (5th Cir. 1993) ("Ordering someone to get out of a car is itself a 'seizure,' but

a constitutionally permissible one when done incident to a lawful traffic stop" pursuant to the ruling in *Mimms*); *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir.) (The occupants of a car lawfully stopped for a traffic violation "may even be asked to leave their vehicles."), *cert. denied*, 502 U.S. 981 (1991).[1] Our prior decisions, however, are compatible with the view that an officer may ask passengers as well as drivers to exit vehicles lawfully stopped for routine traffic violations for the limited purpose of ensuring an officer's safety. *See, e.g., United States v. Cannon*, 29 F.3d 472, 476-77 (9th Cir. 1994) (An officer can take reasonable protective measures such as ordering the driver to get out of the car as the particular circumstances warrant upon lawfully stopping a vehicle for a traffic violation.); *United States v. Behanna*, 814 F.2d 1318, 1321 (9th Cir. 1987) (Although the vehicle was stationary, we held the officer's precautionary action of requesting the occupants to get out of the car was reasonable when the officers found two persons asleep in a vehicle bearing an expired license plate and the person in the passenger seat had a record of concealed weapon charges).

Although "the safety of the officer . . . is both legitimate and weighty," *Mimms*, 434 U.S. at 110, it is unreasonable for an officer to have discretion without limits. I would hold, therefore, that an officer may ask passengers to exit a vehicle if the vehicle has been lawfully stopped for a traffic violation and if the officer's request is legitimate and reasonable for the limited purpose of ensuring the officer's safety under the circumstances. Subjecting an officer's conduct to this minimal

[1]In addition to relying on the dicta in these cases, the majority also cites to *United States v. Tellez*, 11 F.3d 530 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1630 (1994), and *United States v. Hardnett*, 804 F.2d 353 (6th Cir. 1986), *cert. denied*, 479 U.S. 1097 (1987). In *Tellez*, however, the court stated "the police can generally order a *suspect* out of a car after a routine traffic stop." 11 F.3d at 533 (emphasis added). In *Hardnett*, the court found that "officers . . . may also order occupants out of a car *when they have a particularized suspicion that the occupants are armed.*" 804 F.2d at 358 (emphasis added).

test of reasonableness is a minor burden compared to the import of virtually eradicating a passenger's Fourth Amendment right to freedom from "arbitrary interference by law officers." In effect, application of the majority's *per se* rule to passengers unnecessarily does away with the Fourth Amendment rights of persons who may be merely along for the ride, so to speak.

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APPENDIX B—UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
JUDGMENT ON VERDICT
FILED ON OCTOBER 4, 1993

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 93-56609
D.C. No. CV-91-04184-LEW(E)

ENRIQUE RUVALCABA,

Plaintiff,

v.

CITY OF LOS ANGELES; et al.,

Defendants.

This action came on for trial before the Court, Honorable E. Laughlin Waters, District Judge, presiding. The case was trifurcated with liability tried first. The issues having been duly tried, and the jury having duly rendered its verdict.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants, CITY OF LOS ANGELES, DARYL F. GATES, JOHN SCHIFFNER, JOHN BACKUS, DAVID JACOBY, THOMAS WILLIAM NOLAN and THOMAS CASPER, recover of the plaintiff, ENRIQUE RUVALCABA, their costs of action.

DATED: 10/4/93

JUDGE LAUGHLIN E. WATERS

APPENDIX C—NINTH CIRCUIT COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING FILED NOVEMBER 3, 1995

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-56609
D.C. No. CV-91-04184-LEW(E)

ENRIQUE RUVALCABA,

Plaintiff-Appellant,

v.

CITY OF LOS ANGELES; DARRYL GATES, Police Chief; JOHN SCHIFFNER; JOHN BACKUS, et al.,

Defendants-Appellees.

Before: BEEZER and TROTT, Circuit Judges, BURNS, Senior District Judge.*

A majority of the panel has voted to deny the petition for rehearing. Judges Beezer and Trott vote to reject the suggestion for rehearing en banc and Judge Burns recommends accepting the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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*The Honorable James M. Burns, Senior United States District Judge for the District of Oregon, sitting by designation.

Supreme Court, U.S.
FILED
APR 22 1996
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No. 95-1244

In The

SUPREME COURT OF THE UNITED STATES

October Term 1995

ENRIQUE RUVALCABA,

Petitioner,

vs.

CITY OF LOS ANGELES, *et al.*,

Respondents

ON PETITION FOR A WRIT TO CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

James K. Hahn, City Attorney
G. Daniel Woodard, Assistant City Attorney
Katherine J. Hamilton, Asst. City Attorney
JANET G. BOGIGIAN, Deputy City Attorney
Counsel of Record

ATTORNEYS FOR RESPONDENTS
1700 City Hall East
200 North Main Street
Los Angeles, California 90012
Telephone: (213) 485-3626

QUESTIONS PRESENTED

1. In *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), the United States Supreme Court recognized traffic stops are high-risk situations for police officers not because drivers are presumed dangerous but because the car conceals its occupants and weapons are easily hidden within a car. As such, the court gave officers the discretion to have drivers exit the car. Did the Ninth Circuit in *Ruvalcaba* correctly determine *Mimms* applies to passengers because its rationale logically encompasses all of the vehicle's occupants?

2. Should certiorari be granted where, as petitioner himself acknowledges, there is no conflict between the Court of Appeals on the issue of whether *Pennsylvania v. Mimms* should apply to passengers?

3. At best, there are only three opinions from state courts of last resort that have declined to adopt a per se rule extending *Mimms* to passengers. Those cases all set out minimal standards an officer must meet before asking a passenger to step out of the car; and under any of those standards the outcome of this case would be the same. Should certiorari be granted under these circumstances?

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Respondents, the City of Los Angeles, *et al.*, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit's opinion in *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323 (9th Cir. 1995).

SUMMARY OF ARGUMENTS

With logic, legal authority, and an accurate view of reality on its side, the Ninth Court issued an opinion ruling that because officer safety during traffic stops is a legitimate and weighty concern, an officer *may* ask a passenger to step out of a lawfully-detained vehicle without having probable cause or a reasonable suspicion of criminal activity. In the final analysis, there can be no doubt that officer safety far outweighs such a *de minimis* intrusion on passengers.

The Ninth Circuit's basic premise that the reasoning in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), applies to passengers as well as drivers rests on impenetrable logic. The inherent danger in making a traffic stop has nothing to do with the fact that the driver may have committed some minor traffic offense. Traffic stops are risky because the vehicle partially conceals the occupants from the officer's view and occupants can easily access weapons without being seen.

Nor is the Ninth Circuit's application of *Mimms* to passengers in conflict with any other circuit opinion.

To the extent there is any divergence between state courts of last resort, those three cases unwilling to extend *Mimms* to passengers nevertheless conclude the police must meet only minimal standards before asking a passenger to step out of a car.

Under those standards, the officers here were completely justified in asking passenger Ruvalcaba to exit the car. The stop occurred at 1:30 a.m. in a high-crime area. The driver chose to pull over on a dark side street and one officer had recognized Ruvalcaba as a robbery suspect he had chased two years ago at the exact same location. The officers also knew Ruvalcaba -- one of the vehicle's three occupants -- as a man who had been involved in criminal activities.

By any standards, the outcome in this case is correct and the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

1. Proceedings Below

Enrique Ruvalcaba [Ruvalcaba] filed a 42 U.S.C. § 1983 complaint against the City of Los Angeles, the Chief of the Los Angeles Police Department, and individual officers, claiming unlawful detention.

The case was tried against the individual officers, with the jury finding the officers did not cause Ruvalcaba "to be

deprived of his constitutional rights." Ruvalcaba's motions for new trial and judgment notwithstanding the verdict were denied.

The Ninth Circuit affirmed. (Petition, Appendix A). Ruvalcaba filed a petition for rehearing and suggestion for rehearing en banc. Both were denied on November 3, 1995; no judge in active service requested a vote to hear the matter en banc. (Petition, Appendix C, p. 18a).

2. Statement of Facts

Two Los Angeles Police Officers, with 38 years of experience between them, were patrolling at approximately 1:30 a.m. in February of 1991. They spotted a car -- driven by Enrique Ruvalcaba's brother -- fail to stop for a stop sign at an intersection near a convenience store. Officers John Backus and David Jacoby decided to stop the car.

But first they followed the car, using the time to run the license plates. They also drove alongside of the vehicle because they could see several heads and wanted to determine how many people were in the car before they stopped it. There were three occupants, including Enrique Ruvalcaba who was the passenger in the front seat.

Officer Backus recognized Ruvalcaba as a man with whom he had had many prior encounters. He also knew of Ruvalcaba's criminal activities.

Some two years earlier at 2:30 a.m. at the same location

near the convenience store, Officer Backus spotted Ruvalcaba in a dark alley. Suspecting Ruvalcaba had been involved in a burglary, the officer followed him. Ruvalcaba ducked into a dumpster and then tried to flee but he was eventually taken into custody.

Based upon Officer Backus' knowledge of Ruvalcaba's activities and his past dealings with him, he believed there was a heightened danger in stopping the car. The officers activated their red lights but the driver did not pull over to the right curb although it was the logical place to stop. Instead he continued driving, eventually stopping on a poorly-lit side street.

Officer Backus was concerned the driver was controlling the situation by picking where he wanted to stop. The officer believed the driver might be setting them up by committing a traffic violation to draw them to an area where other people would be lying in wait for the officers.

Given all this, Officer Backus feared for his and his partner's safety. He decided the safest way to handle the situation was to have all three occupants exit the car.

The officers got out of their car and Ruvalcaba's brother and the other passenger, Salvador Haro [Haro], obeyed the officer's request to step out of the car and walk over to the sidewalk. The brother and Haro, a convicted felon, both admitted they gave the police false names because they thought there were warrants out for their arrest.

After those two were standing on the sidewalk, the

officers asked Ruvalcaba to step out. Ruvalcaba immediately flung the door open, jumped out and faced them. As he stood there with both hands in the pockets of his jacket, he said loudly, "'What the fuck is going on?'" When Officer Jacoby asked him to take his hands out of his pockets and put them behind his head, he took off his jacket, threw it over the car into the traffic lane and responded, "'You put your fucking hands behind your head.'" He yelled "Fuck you" many times and advanced towards the officers.

Ruvalcaba reeked of alcohol. In Officer Backus' opinion, he was intoxicated. Ruvalcaba admitted the group had been drinking beer before they had gotten in the car. He also admitted they had stopped at the convenience store to purchase more beer.

Ruvalcaba advanced towards the officers, ignoring orders to stop. He took a boxing stance with both hands clenched in front of his chest. He continued swearing, called the officers "a couple of punks" and ignored their commands that he stop and calm down.

By now Officer Backus feared that "we were definitely being set up here for a ambush situation where our attention is diverted to Mr. Ruvalcaba and the other individuals bring harm to us."

When Ruvalcaba reached the front of the police car, he moved towards Officer Jacoby and an altercation ensued. He was taken to the hospital and treated for his injuries.

REASONS TO DENY THE WRIT

1.

CLAIMS THAT THE COURT MISAPPLIED *PENNSYLVANIA V. MIMMS* AND THAT THE COURT MADE ERRONEOUS FACTUAL FINDINGS AS TO THE DANGEROUS NATURE OF TRAFFIC STOPS ARE NOT GROUNDS FOR GRANTING CERTIORARI

In urging this Court to grant his petition, Ruvalcaba argues that the Ninth Circuit has misapplied *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), to passengers. (Petition, pp. 7-11).

He also argues the Ninth Circuit's conclusion that it may be safer for the officer to have the passengers step out of the car is unsupported by the factual record in the case. (Petition, pp. 12-15). Amicus adds that there is no factual basis for concluding that officers face heightened danger in making traffic stops. (Amicus Petition, pp. 5-15).

But Rule 10 of the Rules of the Supreme Court of the United States specifically warns, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Thus, neither a claim that the law of *Mimms* was erroneously applied nor an allegation of incorrect factual findings is grounds for granting certiorari.

THE RATIONALE OF *MIMMS* DOES LOGICALLY APPLY TO PASSENGERS

If this Court were to consider Ruvalcaba's claim that the Ninth Circuit erred in applying *Mimms* to passengers as a basis for granting his petition, the argument should fail on the merits.

Ruvalcaba argues "a close examination of the *Mimms* rationale shows it only applies to drivers." (Petition, p. 7). In fact, quite the opposite is shown upon close examination of *Mimms* as well upon review of cases documenting this Court's long-held acknowledgment that traffic stops are uniquely dangerous for law enforcement officials.

a. Traffic stops are dangerous not because drivers are unusually dangerous people but because the car conceals its occupants and is an excellent hiding place for weapons

The Ninth Circuit candidly acknowledged *Mimms* did not "control the outcome" in *Ruvalcaba*, 64 F.3d at 1327. But the court understood the central premise of *Mimms* and reached the correct conclusion that "the reasoning behind *Mimms* is equally applicable to passengers in a vehicle as it

is to drivers." *Ruvalcaba*, 64 F.3d at 1327, n. omitted.

The heart of *Mimms* is the court's finding that the unique nature of a traffic stop makes it an inherently dangerous situation. "[W]e have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile." 434 U.S. at 110.

Thus, *Mimms* never based its opinion on a finding that drivers are somehow more likely to be dangerous people because they have committed a traffic violation. Rather, the danger in making a traffic stop arises from the fact that the vehicle's occupants -- driver and passengers alike -- are largely concealed in the car so an officer cannot fully view them. And, they can quickly access weapons without being observed.

In giving officers the discretion to ask a driver step out of the vehicle, *Mimms* allowed officers to avoid "permitting an individual being detained to have possible access to a dangerous weapon and the benefit of the partial concealment provided by the car's exterior. See *Pennsylvania v. Mimms*, *supra*, at 110, 98 S.Ct., at 333." *New York v. Class*, 475 U.S. 106, 116, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986).

As such, the occupant's status as driver or passenger is not at all critical to the reasoning of *Mimms*. The problem is the stop itself is high-risk. Thus, *Ruvalcaba* correctly determined *Mimms* logically applies to passengers.

b. The Supreme Court has long recognized that vehicle stops are high-risk situations

The Supreme Court's opinion in *Mimms* that traffic stops pose "inordinate risk" for officers did not come out of the blue. Dating back to 1972 -- long before drive-by shootings lengthened the ever-proliferating list of violent crimes plaguing this country -- this Court recognized vehicle stops are high-risk situations.

In *Adams v. Williams*, 407 U.S. 143, 148, n. 3, 92 S.Ct 1921, 32 L.Ed.2d 612 (1972), the court cited to a study showing approximately 30 percent of police shootings occurred when a police officer approached a suspect seated in an automobile.

One year later in *United States v. Robinson*, 414 U.S. 218, 234, n. 5, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), the court commented "that a significant percentage of murders of police officers occurs when the officers are making traffic stops."

A few years later in *Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 278 (1978), the court spoke again of the particular risks in making traffic stops. Noting that, within limits, officers could ask drivers and passengers to exit a vehicle and do pat-down searches, the court observed,

> "That this prophylactic authority is essential is attested by the number of police officers wounded or

killed in the process of making inquiry in borderline, seemingly minor violation situations for example, where the initial stop is made for a traffic offense but, unknown to the officer at the time, the vehicle *occupants* are armed and engaged in or embarked on serious conduct." 435 U.S. at 298, emphasis added.

Finally, in *Michigan v. Long*, 463 U.S.1032, 1047, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the court reiterated that in *Mimms* it had "recognized that investigative detentions involving suspects in vehicles are especially fraught with danger to police officers."

Thus, the Ninth Circuit surely did not "misapprehend" the Supreme Court's well-established position that it is the nature of traffic stops that make it a situation fraught with danger and not any "danger from the driver as a result of being stopped for a traffic violation." *Ruvalcaba*, 64 F.3d at 1327-1328. *Ruvalcaba* did not "misapply" the rationale of *Mimms* to passengers.

3.

THE CONCERN FOR OFFICER SAFETY DURING TRAFFIC STOPS IS STRONGLY ROOTED IN CASE LAW AND FACTUAL REALITY

Paying no heed to the Supreme Court's long-held acknowledgment that traffic stops are "fraught with danger", Ruvalcaba and amicus argue the Ninth Circuit had no factual

support for its conclusions that traffic stops are dangerous and that it is safer for an officer to have all the occupants exit the vehicle. Ruvalcaba also adds "common sense dictates it is safer to leave passengers in the car. (Petition, p. 13; Amicus Petition, pp. 5-15).

But petitioner's personal view as to what common sense dictates is hardly the basis for granting certiorari. (Petition, p. 13). Nor, as set forth above, is it the role of the Supreme Court to review a case to evaluate if the lower court's factual findings are correct.

a. *Ruvalcaba's* conclusion that officers should decide if it is safer to leave passengers in the car or to have them step out is supported by sound case law

In any event, reaching the merits of this argument, Ruvalcaba has again misconstrued the Ninth Circuit's position. The court did not rule an officer *must* have passengers step out of the car. *Ruvalcaba* expressly states officers are "not required to take this protective step. We merely hold that such a routine practice is permissible under the Fourth Amendment." 64 F.3d at 1328, n. 4.

In other words, in permitting officers to decide whether they are more comfortable keeping passengers in the car or having them exit, the Ninth Circuit elected not to substitute its judgment for that of the officers who are in a far better

position than lawyers or judges to determine the safest way to handle a stop. While the confinement of the car may bring comfort to an officer in the circumstances of a particular stop, in other situations an officer may feel far more secure distancing the passengers from the vehicle.

Interestingly, the Superior Court of Pennsylvania recently extended *Mimms* to passengers, noting "the potential danger to police increases, rather than diminishes, when passengers are present in a car." And, the "most appropriate method of mitigating that danger is to order the passengers to exit the vehicle so they can remain in full view of the officer. . . . " *Commonwealth v. Brown*, 439 Pa.Super. 516, 528, 654 A.2d 1096, 1102 (1995).

Brown is a case in point as to how the latter strategy could save an officer's life. When the officer approached the car, he was unaware there was a rear seat passenger. "That passenger had access to three loaded firearms, one of which had just been used to kill an unwitting citizen" during a robbery. 439 Pa. Super at 528-529, 654 A.2d at 1103.

Another case in point is *People v. Robinson*, 74 N.Y.2d 773, 545 N.Y.2d 90, 543 N.E.2d 733 (N.Y. 1989), *cert. denied*, 493 U.S. 966 (1989). There the officer had no particularized suspicion regarding the passenger of a vehicle stopped for a traffic violation but nevertheless had him step out of the vehicle. After the passenger door was opened, the officers spotted the butt of a loaded .357 magnum handgun "plainly visible protruding from beneath the seat."

Id. at 733. Had the officer not followed his instincts in asking the passenger to step out, the outcome of that incident could have been far different.

On balance, the New York Court of Appeals found police should not have to take that risk and also applied *Mimms* to passengers:

> "Inasmuch as the risks in these police/civilian vehicle encounters are the same whether the occupant is a driver or a passenger, 'police may order persons out of an automobile during a stop for a traffic violation.'" 543 N.E.2d at 733-734, quoting *Michigan v. Long*, 463 U.S. at 1047-1048 . . . ." citations omitted.

See also *State v. Ferrise*, 269 N.W.2d 888 (Minn. 1978), extending *Mimms* to passengers in part because "[t]he same concern of the officers for their own safety applies" while the intrusion on the passengers' rights "is no greater than the intrusion on the rights of the driver." 269 N.W.2d at 890.

Similarly, in *State v. Landry*, 588 So.2d 345 (La. 1991), the Supreme Court of Louisiana illustrated the dangers posed by passengers by discussing the facts from another case. There, after the officer had the passenger and driver exit, he spotted a sawed-off shotgun between the front seat and passenger side door. *Id.* at 346. "Ordering a passenger

out of the vehicle not only places him in the view of the officer, but also distances him from access to weapons. The justification for ordering the passenger out of the vehicle is just as compelling as the justification for ordering the driver out." 588 So.2d at 347.

In fact, as the Superior Court of *Pennsylvannia* had concluded in *Brown*, the Michigan Court of Appeal similarly reasoned,

> "[o]ne could even advance the argument that the passenger presents a greater threat to the officer than does the driver, since the officer's attention in the traffic stop is going to be focused on the driver, and he may not be immediately aware of the activities of the passenger, including the possibility that the passenger may retrieve a firearm and assault the officer." *People v. Martinez*, 187 Mich.App. 160, 466 N.W.2d 380, 384, n. 5 (1991).

The Ninth Circuit's conclusion that passengers can indeed make a traffic situation all the more dangerous and the officer should have the discretion to have them get out of the car to alleviate that risk finds strong support in case law..

b. There is a substantial factual basis for the court's conclusion that traffic stops are inherently dangerous

Amicus' inferences to the contrary, the Ninth Circuit also had substantial support in fact and in logic for its conclusion that there is very real danger involved in making traffic stops.

Amicus suggests the Ninth Circuit was "unnecessarily alarmist in its focus on the danger of police shooting." Amicus offers the opinion that "many" police officers never get shot or shoot anybody and "police work is not significantly more dangerous than the average job." (Amicus Petition, pp. 9-10).

In support of this opinion, amicus cites to statistics and newspaper articles that do not address the issue at hand and were never raised in the trial court. (Amicus Petition, pp. 8-14).

Amicus' speculates that "[u]ndoubtedly, approaching cars for minor traffic infractions is many times safer" than other types of police encounters. (Amicus Petition, p. 11, n. 8). But this Court in *Mimms* rejected just such a claim:

> "[W]e have before expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations. [Citation]. Indeed, it appears 'that a significant percentage of murders of police officers

occurs when the officers are making traffic stops. [Citation]." 434 U.S. at 110.

Unfortunately, *Mimms'* observation rings even truer today than it did in 1977. As the court put it in *Commonwealth v. Brown, supra*, after discussing the officer's discovery of three guns in the back seat of the car -- one of which had just been used as a murder weapon:

> "It is this type of scenario which prompted the United States Supreme Court [in *Mimms*] to conclude that, in keeping with the Fourth Amendment, the interest in the safety of law enforcement officials outweighs the de minimis intrusion to the individual who is asked to step outside a lawfully stopped vehicle." 439 Pa.Super at 529, 654 A.2d at 1103.

The Seventh Circuit in *United States v. Packer*, 15 F.3d. 654 (7th Cir. 1994), has done a far better job than amicus in researching articles that accurately record the ever-escalating, frightening problem of officer safety in the relevant context of making these stops.

Packer began with the observation,

> "[i]t is a regrettable fact of life in late-20th century America that police officers justifiably are concerned for their safety, and, indeed, their lives, when they approach citizens in the course of routine traffic stops." 15 F.3d at 657, n. 2.

In support of this observation, the court cited to a newspaper database search it conducted in just the six-month period preceding the submission of that case. *Ibid.* The court's research deflates Ruvalcaba's attempts to downplay officer safety concerns during vehicle stops.

For example, *Packer* cites to the *Los Angeles Times* article of December 29, 1993, reporting the shooting death of a Manhattan Beach police officer by a motorist near a shopping mall. That article, the court emphasized, included the statistic that the officer was "one of at least fifteen officers killed or wounded by motorists in routine traffic stops over past five years in Southern California." *Ibid.*

Parker cites these additional newspaper articles that counter amicus' half-hearted attempts to suggest traffic stops pose little danger:

- a Long Beach officer was in critical condition after being shot three times during a routine traffic stop. (*Los Angeles Times*, August 11, 1993).
- a man was convicted of murder in the roadside slaying of a Virginia State trooper during a routine traffic stop. (*Washington Post*, November 17, 1993).
- a teenage convicted of gunning down a state trooper during a routine traffic stop was sentenced to death. (*San Diego Union-Tribune*, July 15, 1993).
- an officer was shot to death and his partner wounded during a routine traffic stop. (*Philadelphia Inquirer*, June 24, 1993). *Ibid.*

Packer concluded, "In light of these realities, precautionary procedures such as those employed by the officers here (the use of 'take down' lights, requests to place hands in the air, etc.) unquestionably are reasonable when making traffic stops." *Ibid.*

The Ninth Circuit also properly concluded that in light of the case law and these factual realities, the "minimal" intrusion in having to step out of the car is vastly outweighed by serious officer safety concerns and, on balance, does not violate a passenger's Fourth Amendment rights.

4.

RUVALCABA IS CONSISTENT WITH THIS COURT'S OWN INTERPRETATION OF *MIMMS*

While Ruvalcaba portrays the Ninth Circuit's opinion as a ground-breaking decision (Petition, p. 8), the Supreme Court itself has failed to distinguish between drivers and passengers in discussing *Mimms*.

In *Michigan v. Long*, *supra*, 463 U.S. at 1047-1048, the court said *Mimms* "held that police may order *persons* out of an automobile during a stop for a traffic violation . . . ." Emphasis added.

In *Rakas v. Illinois*, 439 U.S. 128, 155, 99 S.Ct. 421,

436, 58 L.Ed.2d 387 (1978), Justice Powell in his concurring opinion stated, "Last term, this Court determined in *Pennsylvania v. Mimms* . . . that *passengers* in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made." Emphasis added.

5.

RUVALCABA IS CONSISTENT WITH OPINIONS FROM OTHER COURT OF APPEALS AND DOES NOT CONFLICT WITH AN OPINION FROM ANY OTHER CIRCUIT

Ruvalcaba appears to concede there is no split of authority between the circuits of the United States Court of Appeals on the issue of whether *Mimms* extends to passengers. Therefore, this cannot be a basis for granting his petition. He states,

> "There is also no decision of the Court of Appeals holding that officers do not have the discretion to order passengers out of cars during routine traffic stops" (Petition, p. 8, n. 5).

He even identifies at least one district court opinion that "squarely" addresses the issue and holds that *Mimms* does apply to passengers. *United States v. McCoy*, 824 F.Supp. 467, 473-74 (D. Del. 1993). (Petition, p. 8, n.5).

Indeed, there are several opinions from the Court of

Appeals that are consistent with *Ruvalcaba*. As such, the Ninth Circuit is far from alone in recognizing there is no logical distinction between the potential risk posed to the officer by the driver or a passenger.

The Tenth Circuit in *United States v. Hill*, 60 F.3d. 672 (10th Cir. 1995), *cert. denied*, 116 S.Ct.431 (1995), extended *Mimms* in a case where the passenger was a "suspect," but the only thing the passenger was "suspected" of was not wearing a seatbelt. Such a violation is hardly a crime of moral turpitude nor does it give cause for an officer to automatically fear for his or her safety.

In declining to limit *Mimms* to drivers, *Hill* noted,

> "It is not apparent to us why a passenger should be treated differently from the driver of the vehicle for this analysis because the risk to the officer and the intrusion upon the privacy of the suspect will be similar whether the suspect is a driver or a passenger. Thus, we apply *Pennsylvania v. Mimms* to the situation where the passenger is a suspect." *Id.* at 682, citations omitted.

As *Ruvalcaba* notes, other circuits have extended *Mimms* to passengers, although they have done so "without significant analysis." 64 F.3d at 1327, n. 3. Nevertheless, all four opinions *Ruvalcaba* cites are completely consistent with this opinion.

In *United States v. Tellez*, 11 F.3d 530, 533 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1630 (1994), the police had no particularized suspicion that passenger Tellez, who was seated by the passenger door, was involved in criminal activity. But the court concluded, "[i]n order to safety determine if the parole violator was in the truck, it was reasonably necessary to remove Tellez."

In *United States v. Shabazz*, 993 F.2d 431, 437, n. 7 (5th Cir. 1993), the court addressed the officer's right to have the driver exit but noted, "Ordering *someone* to get out of a car is itself a seizure but a constitutionally permissible one when done incident to a lawful traffic stop. *See Pennsylvania v. Mimms, supra.*" Emphasis added.

In *United States v. Hardnett*, 804 F.2d 353, 358 (6th Cir. 1986), *cert denied*, 479 U.S. 1097 (1987), the police received information that defendant and his passengers were armed. When they stopped the car, all occupants were ordered out. The court found the seizure permissible and "[a]s an incident to this permissible seizure, the officers were permitted to order the *occupants* out of the vehicle." Emphasis added.

Finally, in *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir. 1991), *cert denied*, 502 U.S. 981 (1991), in dicta the court read *Mimms* as permitting officers to ask drivers and passengers to step out of the car.

Ruvalcaba does not and could not claim any of these four decisions "directly" conflicts with the Ninth Circuit's

opinion. Rather, he tries to distinguish them on their facts and dismiss their relevance by claiming the Ninth Circuit relied on dicta from them. (Petition, pp. 9-10). But even if they contain only dicta on this point, that dicta is completely consistent with the Ninth Circuit's holding and provides no basis for granting certiorari.

VI.

PRIOR NINTH CIRCUIT CASE LAW IS ALSO CONSISTENT WITH THIS OPINION

Not only is *Ruvalcaba* in alignment with other circuits, it is also consistent with earlier Ninth Circuit opinions.

Long before *Mimms*, the Ninth Circuit in *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971), began forging the same path of logic it has traveled in *Ruvalcaba:*

> "In it inconceivable that a peace officer effecting a lawful arrest of an occupant of a vehicle must expose himself to a shot in the back from defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance. All companions of the arrestee within the immediate vicinity, capable of accomplishing harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance they are unarmed." *Id.* at 1193.

After *Mimms*, the Ninth Circuit in *United States v. Wiga*, 662 F.2d 1325 (9th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982), looked to *Mimms* and to the language in *Berryhill* in determining that

> "[o]fficers engaged in the lawful arrest of an operator of a vehicle have a legitimate interest in seeing that the other occupants of a vehicle do not impose any danger to them while executing the arrest of the operator." *Id.* at 1332, fn. omitted.

Thus, in the context of a motor home where the interior of the vehicle was particularly inaccessible to the officer's view and there was a question as to the number of occupants, the court found no Fourth Amendment violation in ordering out the occupants. As the Ninth Circuit recognized in *Ruvalcaba, Wiga* is "of course, entirely consistent with the result we reach here." 64 F.3d at 1327, n. 3.

More recently in *United States v. Behanna*, 814 F.2d 1318 (9th Cir. 1987), the Ninth Circuit found an officer who stopped a truck for expired license plates could take the reasonable precautionary measure of asking the occupants of the truck to exit the vehicle. The vehicle registration did not match the name given by the driver and a computer check showed the passenger had a history of concealed weapon charges. While these factors gave rise to suspicious circumstances, the court did not require that the officer have

probable cause or reasonable suspicion that the passenger was involved in criminal activity before he could ask the passenger to step out of the car. *Id.* at 1321.

Again, these Ninth Circuit decisions are all completely consistent with *Ruvalcaba*.

7.

THE OUTCOME IN *RUVALCABA* WOULD BE THE SAME UNDER ANY OF THE STATE COURT CASES THAT PETITIONER ARGUES ARE "IN CONFLICT"

Finally, Ruvalcaba urges his petition should be granted because there is a "sharp conflict" between state courts "with many decisions by courts of last resort on each side of the question . . . . " He then cites nine cases that have extended *Mimms* to passengers and eight cases that he argues "reject the view that *Mimms* applies to passengers." (Petition, pp. 5-6).

But several of those cases are not at all in conflict with *Ruvalcaba* and the outcome in *Ruvalcaba* would be the same under any of their rulings.

Of those eight cases he identifies as rejecting an extension of *Mimms* to passengers:

- Three are not from state courts of last resort. *People v. Maxwell*, 206 Cal.App.3d 1004, 254 Cal.Rptr. 124

(1988); *Commonwealth v. Elliott*, 376 Pa.Super. 536, 546 A.2d 654 (1988); and *Johnson v. State*, 601 S.W.2d, 326 (Tenn. Crim. App. 1980). And, as to *Elliott*, the same court later squarely faced the issue of extending *Mimms* to passengers in *Commonwealth v. Brown, supra,* and did extend it, holding officers may ask passengers to exit "in all cases involving lawful traffic stops." 439 Pa.Super. at 528, 654 A.2d at 1102.

- Two cases expressly declined to decide the issue of whether *Mimms* applies to passengers and therefore are not, as Ruvalcaba suggests, cases that "reject the view that *Mimms* applies to passengers." (Petition, p. 5). *Bethea v. Commonwealth*, 245 Va. 416, 419, 429 S.E.2d 211, 213 (1993), "[w]e need not determine whether the de minimis rationale utilized in *Mimms* is applicable to a passenger in a vehicle when the initial vehicle stop is predicated solely on matters pertaining to the driver"; and *Commonwealth v. Elliot, supra*, declining to decide whether *Mimms* extends to passengers, but adding "the rationale used in *Mimms* would seem to suggest this result . . . " 376 Pa.Super. at 549, 546 A.2d at 660.
- Two cases address the entirely different issue of whether the police can open the passenger door. *Johnson v. Tennessee, supra*, 601 S.W.2d at 329; and *State v. Schlosser*, 774 P.2d 1132, 1135, 108 Utah.Adv.Rep. 38 (Utah 1989).

Finally, four of those cases (including *Maxwell*, which is not from a court of last resort), articulate minimal standards under which an officer is justified in ordering a passenger out of a car. Under any of those standards, the officers in *Ruvalcaba* were justified in having Ruvalcaba exit the car. *(People v. Maxwell, supra; State v. Becker,* 458 N.W.2d 604 (Iowa 1990); *State v. Smith,* 134 N.J. 599, 637 A.2d 158 (N.J. 1994); and *State v. Wilson,* 106 Md.App. 24, 664 A.2d 1 (Ind. 1995), pet. for cert. pending, 95-1268. Therefore, the outcome in *Ruvalcaba* is completely consistent with them and they offer no basis for granting certiorari.

Because *Ruvalcaba* found the per se rule of *Mimms* applicable to passengers, the court said it need not address the argument that the officers had "compelling reasons in this case" for having Ruvalcaba step out of the car. Nevertheless, the court noted that

> "the circumstances would have alarmed any officers. It was late at night, the Ruvalcaba car pulled onto a side street before stopping, and Officers Backus and Jacobs knew about some criminal history of at least one occupant." 64 F.3d at 1328.

These circumstances would have justified the minimal intrusion on the passenger under any of the diluted standards set out in the state cases that have declined to adopt the per se rule.

In *Maxwell*, the California Court of Appeal decided each case should be viewed on its own facts but expressly rejected a requirement that "the level of suspicion or cause to order a passenger to alight is the same as that necessary for a temporary detention." 206 Cal.App.3d at 1007-1008. There, the court found the officer's concern for his safety and his need to identify the driver justified the "minimal intrusion" on the passenger's liberty. *Id.* at 1010.

In *Smith*, the New Jersey Supreme Court declined to adopt a per se rule but also rejected the argument that the officer must be able to point to the specific facts that the occupants were armed and dangerous before asking them to exit.

> "Rather, the officer need point only to some fact or facts in the totality of the circumstances that would create in a police officer a heightened awareness of danger that would a warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car." 134 N.J. at 618, 637 A.2d at 167.

In *Becker*, the Supreme Court of Iowa, required there be "some articulable suspicion" "concerning a violation of law by that person" or "further interference with the passenger is required to facilitate a lawful arrest of another person or lawful search of the vehicle." 458 N.W. 2d at 607.

Finally, the Maryland Court of Special Appeals upheld the lower court's suppression order because there was no

evidence that in having the passenger exit, the police had acted "out of any sense of apprehension." *Wilson*, 106 Md. App. at 54, 664 A.2d at 15. But the court only required there be "some individualized or particularized suspicion . . . . Where officer safety is concerned, the reasonableness threshold is low, but there is a threshold." 106 Md. at 48, 664 A.2d at 12.

The circumstances here -- the early morning hour, the same high-crime area where one of the officers had previously chased Ruvalcaba as a robbery suspect, and the driver choosing to pull over on a dark side street -- more than justified the officer's decision to have the driver and two passengers exit the car under any of these state's standards.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Dated: April 22, 1996

James K. Hahn, City Attorney
G. Daniel Woodard, Assistant City Attorney
Katherine J. Hamilton, Asst. City Attorney

JANET G. BOGIGIAN, Deputy City Attorney
Counsel of Record
Attorneys for Respondents
1700 City Hall East
200 North Main Street
Los Angeles, California 90012
(213) 485-3626

EDITOR'S NOTE

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No. 95-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

ENRIQUE RUVALCABA,

Petitioner,

vs.

CITY OF LOS ANGELES, et al.

Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY POLICE MISCONDUCT LAWYERS REFERRAL SERVICE AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
ATTORNEYS FOR *AMICUS*
3435 Wilshire Boulevard, Ste. 2900
Los Angeles, CA 90010
(213) 252-9444

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Police Misconduct Lawyers Referral Service (PMLRS), respectfully moves the Court for leave to file the following brief *amicus curiae* in support of the petition for a writ of certiorari filed by Enrique Ruvalcaba. The consent of counsel for petitioner has been obtained, but counsel for respondents has not consented to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

PMLRS is certified by the State Bar of California and has operated as a non-profit agency since 1982 under the auspices of Community Services Unlimited, Inc. Headquartered in Los Angeles, PMLRS provides consultation and assistance to victims of police misconduct throughout Southern California and, when appropriate, it refers victims to private attorneys for representation in civil lawsuits alleging police misconduct.

The PMLRS panel consists of approximately 75 competent attorneys experienced in police

emisconduct litigation.[1] PMLRS holds regular workshops and seminars on various aspects of civil rights litigation to keep its panel attorneys abreast of recent developments in trial tactics and the law. In addition, PMLRS actively seeks to recruit new attorneys for its panel to expand its capacity for representing police abuse victims and to increase the choices available for its clients.

PMLRS often refers relatively small civil rights cases to its panel attorneys. Police misconduct victims with serious injuries generally obtain counsel from the regular plaintiff's personal injury bar. Victims with less serious injuries have difficulty obtaining counsel at all. Without PMLRS, many of these victims would not otherwise obtain legal representation for their cases. Most are members of poor and minority communities, the segments of the population which bears the brunt of police abuse.

The interest of the *amicus* is to assure that developments in the law concerning interactions between police and citizenry which adversely impact large segments of the population receive careful attention. *Amicus* is particularly concerned with

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[1] Mr. Ruvalcaba's trial and appellate counsel, John Burton, is an active member of PMLRS.

encroachments which will especially impact the low income minority population served by *amicus*.

NECESSITY FOR *AMICUS CURIAE* BRIEF

The decision of the Ninth Circuit in *Ruvalcaba* treats as "de minimus" intrusions by the police effecting huge numbers of persons every day, in what is probably the most common interaction between citizens and the police -- the traffic stop. And it does so without paying any recognition to the fact, of which *amicus* is well aware, that police decisions unreasonably to order people about -- like ordering Mr. Ruvalcaba out of the car into the rain -- are most often directed at ethnic minorities and others who have the least power to do anything about it; frequently cause smoldering resentment; and sometimes are the tinder that flares into open confrontations between whole communities and the established order.

The Ninth Circuit decision suffers from a flaw common to many decisions about appropriate police behavior. It is based upon unproven and probably erroneous assumptions of appellate judges about what enhances officer safety and what detracts from it. Rather than examining officer safety questions as

factual matters requiring evidence from knowledgeable sources for their proper resolution, the courts are prone to accept the assertion that the challenged behavior is good for "officer safety" as though it were a sacred mantra, the truth of which is not subject to debate. One result of that unfortunate method of appellate fact finding is that it may result in decisions, like the one here, which promote police behavior which is not good for anyone's safety, including the safety of the police.

Respectfully submitted,

Robert Mann, Counsel of Record
Donald W. Cook.
3435 Wilshire Blvd., Suite 2900
Los Angeles, California 90010
Telephone: (213) 252-944

Attorneys for *Amicus Curiae*
Police Misconduct Lawyers Referral Service

ARGUMENT

I. FACTS

LAPD officers ordered Enrique Ruvalcaba, a passenger in a car the police pulled over for failing to stop at a stop sign, out of the car. After requiring Mr. Ruvalcaba to get out of the car, an altercation ensued resulting in serious injuries to Mr. Ruvalcaba. The case was tried on the assumption that the police are not permitted to order a passenger out of a car absent some reason. The Ninth Circuit affirmed, however, holding that any passenger can be ordered out of any car legally stopped by the police.

II. THE NINTH CIRCUIT WRONGLY RELIES ON UNPROVEN "OFFICER SAFETY" CONCERNS.

The Ninth Circuit bases its rule permitting police officers to order passengers from cars during routine stops on "officer safety"; yet it does not show how safety is necessarily promoted and it does not deal with the the potential for abuse.

The fact that a " 'weapon can be concealed under the seat of a vehicle.' " 64 F.3d at 1327 (citing *United States v. Salas*, 879 F.2d 530, 535 (9th Cir.), *cert. denied* 493 U.S. 979, 110 S.Ct. 507, 107 L.Ed.2d 509 (1989) is not enough. This "anything is possible" logic can be applied to anyone anywhere; but the Fourth Amendment, through *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968) and its progeny, prohibits discretionary, suspicionless seizures and searches of people.

The issue is not whether the state interest in "officer safety" is both 'legitimate and weighty'; obviously it is.[2] The question is whether police ordering people out of cars for a suspicionless 'roust' does anything to promote it. The courts owe an obligation to both the public and the police to take a true look at the issue, and not to lightly accept or make up "officer safety" rationales to justify intrusive police behavior -- especially where the police themselves cannot agree on whether the behavior in question promotes officer safety or

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[2] Petitioner contends that the state interest in *civilian* safety is equally "legitimate and weighty."

impairs it.[3]

Because of the manner in which the case was litigated – with all parties assuming that reasonable suspicion was required to extract Mr. Ruvalcaba from the car for the intended pat down search – there is no evidence in the record regarding whether as a general matter officers are safer with the passengers inside or outside of cars during routine traffic stops. Normally, that should end the inquiry, since all warrantless activity is presumptively invalid and the burden on the state to establish reasonableness. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Coolidge v. New Hampshire*, 403 U.S. 433, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Appellate courts are not necessarily so well informed about matters of police safety (like anything else requiring specialized knowledge) that they should be making decisions which will adversely effect millions of people without a solid basis.

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[3] For example, in a notorious recent, videotaped, sting operation, Long Beach police claimed that former Hawthorne Police Department sergeant Don Jackson "provoked" them into roughing him up and pushing his head through a plate glass window by getting out of a vehicle stopped for a routine traffic violation. The police claimed that officer safety required passengers be kept *in* the car.

This is especially so where the logic of the situation would make it appear that true officer safety concerns in fact point in the opposite direction. The courts should not lightly *encourage* police to do things which both place police unnecessarily at risk and make life more difficult for ordinary people in their day-to-day encounters with the police. There is always the danger that police will rely on mistaken judicial decisions purporting to illuminate officer safety issues. It is not true that the police always know what is best for their own safety; most police fatalities are attributable to police mistakes, frequently based on poor training and erroneous ideas about what promotes officer safety.[4]

The Ninth Circuit's focus on the danger of

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[4] As explained in a study of California peace officers killed during the years 1987, 1988 and 1989:

> Some of these incidents are unforeseeable which no amount of caution or awareness could have prevented. However, in many cases the victim officer influences the outcome due to some action or inaction on the officer's part. In the current study, most of the 19 felonious killing victims could have employed different tactics or equipment which may have prevented their deaths. And 13 of the 22 officers killed in vehicle-related accidents made errors which contributed to their deaths.

California Commission On Peace Officer Standards and Training, CALIFORNIA PEACE OFFICERS KILLED IN THE LINE OF DUTY 1987-1988-1989 page 2 (August 1992).

police shooting is unnecessarily alarmist. One should not base decisions about how the police will treat millions of people based on erroneous assumptions about the true dangers. Modern police officers do not spend their days in pitched gun battles; the overwhelming majority spend their careers without getting shot at or shooting anybody. Yet the panel's decision approaches Fourth-Amendment balancing as if modern society were a Schwartzenegger action film. Studies establish that, contrary to popular myth, police work is not significantly more dangerous than the average job.[5] According to the Annual Statistical Digest published by the Los Angeles Police Department, in 1991 – the year of this incident – only one LAPD officer was killed in the line of duty "by a felonious act." (Two others died in accidents.) A police officer is only slightly more likely to be murdered than any

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[5] The statistics for injuries and fatalities tell us that policing is a relatively safe occupation compared with fire fighting, shipbuilding, or forestry. The incidence of fatal injuries and injuries involving days lost from work for police is reported as 2.37 events per 100 workers for 1987. The national (U.S.) rate for all industries was 1.86. But policing was safer than fire department work (5.36); ship and boat building (4.20); or forestry (4.10).

Geller & Scott, DEADLY FORCE: WHAT WE KNOW 23 (Police Executive Research Foundation 1992).

other American.[6] Indeed, since the widespread implementation of Fourth-Amendment restraints police work has become increasingly safer; as of 1989 and 1990, "American police were less likely to be killed in the line of duty than at any time in the past three decades."[7] Activities which might seem dangerous to lay persons are, in fact, relatively safe.

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[6] In 1990, when 11.1 American police were feloniously slain per 100,000 officers, the murder/nonnegligent manslaughter rate for the general population was 9.4 per 100,000. [Reference to table omitted.] In 1991, the rates changed to 11.9 for police slain and 9.8 for general population homicides. [Reference to table omitted.] Compared in this way, police were approximately 1.2 times more likely than other Americans to be murdered in 1990 and 1991 -- a relatively small difference.

Geller & Scott at 124. The absolute numbers are small as well. Nationally, in 1994 only 75 of more than 700,000 officers were shot to death in the line of duty. That is one-quarter the number which committed suicide during the same time period. *More Police Died in Suicides Than in Line of Duty,* Los Angeles Times, Dec. 31, 1994, p. A34.

[7] This fact runs contrary to another popular myth. "[O]fficers were not only less likely (based on their numbers on police forces) to get killed over time; they were less likely to be assaulted with the variety of guns, knives, and other dangerous weapons . . . ." Geller & Scott at 130. This trend tends to disprove the concern voiced by Justice Stevens in his *Mimms* dissent that "almost every decision . . . holding that an individual's Fourth Amendment rights have been invaded makes law enforcement somewhat more difficult and hazardous." Instead of expressing such concern, civil-rights minded judges should be congratulating themselves; in the opinions of many experts, sensible judicial restraint on police conduct makes police-civilian confrontations safer for both sides.

For example, 8,681 LAPD arrests for *robbery* resulted in only 18 assaults, nine with firearms.[8] *Id.* In fact, of the 1056 assaults on LAPD officers reported in 1991, 728 were with fists and feet, compared to 150 with firearms. Passengers seated in a car cannot punch or kick effectively. None of the felonious killings of California peace officers in the years 1987 through 1989 arose out of routine traffic stops. CALIFORNIA PEACE OFFICERS KILLED IN THE LINE OF DUTY , *supra*, at page 13.

The Ninth Circuit ratchets up the problem of appellate judges deciding what is good for officer safety, recognized by Justice Stevens in his *Mimms* dissent, a notch higher. Justice Stevens called the majority's "assumption about police safety . . . dubious at best." *Mimms*, 434 U.S. at 117, 98 S.Ct. at 337. He quoted law enforcement authorities which instruct officers to try to keep drivers in the car during traffic stops, rather than extracting them. *Id.* at 119 n. 10, 98 S.Ct. at 337 n. 10. He analyzed the same authorities cited by the panel, 64 F.3d at

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[8] Only a small number of assaults result in actual injury to an officer. Of the 150 reported assaults on LAPD officers with firearms in 1991, six resulted in claims of personal injuries. Of the 1056 total assaults, only 148 resulted in injuries to officers. *Id.* In 99.94% of the more than 232,000 LAPD *arrests* in 1991 (adult and juvenile), there was no injury to an officer. Undoubtably, approaching cars for minor traffic infractions is many times safer.

1327, regarding the danger of police shootings during vehicle stops, showing that it did not seem to support broad officer safety claims. *Mimms*, 434 U.S. at 118-119, 98 S.Ct. at 337. Now, a similar debatable proposition about what is safe and what is not stretches police discretion even further.

Moreover, as explained by Judge Burns in his separate opinion, 64 F.3d at 1329, the *Mimms* majority did not base its holding just on the highly remote possibility that a driver might kill an officer rather than respond to a traffic ticket. It included within "officer safety" the less exotic but far more practical concern[9] that the necessary physical juxtaposition of the officer to the automobile's driver side window – if the driver is allowed to remain seated during the citation process – creates an unnecessary risk of being hit by a car. *Mimms*, 434 U.S. at 111, 98 S.Ct. at 333. Since there is generally no need for the police to talk to the passengers, and because passengers are more likely to be away from traffic on the right hand side of the

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[9] In the years 1987, 1988 and 1989, half again as many California peace officers were killed accidentally (32) than feloniously (19). CALIFORNIA PEACE OFFICERS KILLED IN THE LINE OF DUTY 1987-1988-1989, *supra*, page ii. Of those accidentally killed, the third most common type incident was a pedestrian officer being struck by a vehicle (5 of 32). *Id.* at 42.

car, there is generally no reason to pull passengers out of the car.

It is also important to take into consideration that appropriately *restricting* officers' discretion may save officers' lives. Unreasonably ordering people about, like using unreasonable force, provokes reactions. By way of illustration, since *Tennessee v. Garner* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) restricted the use of force *by* police, despite increases in the general level of interpersonal violence, the use of force *against* police has dropped. Samuel Walker, TAMING THE SYSTEM 32 (Oxford, 1993); W. Geller and M. Scott, DEADLY FORCE, WHAT WE KNOW 127 (Police Executive Research Foundation 1992) ("American police were less likely to be killed in the line of duty than at any time in the past three decades."). According to Professor Walker, one reason for the reduction in shootings *of* police are restrictions on shootings *by* police. "The general trend has been a long downturn in police officers killed in this country. . . . That's a result of new rules on police use of deadly force. What that means is that police are shooting less, and consequently, fewer bullets are coming back the other way." *Police feel ever more vulnerable*, Los Angeles Daily News, Feb. 28, 1994,

p. 28. *See also* J. Fyfe, *Administrative Intervention on Police Shooting Discretion: An Empirical Examination*, 7 J. CRIM. JUST. 309 (1979). As a general rule, good police work entails the *avoidance* of unecessary conflict -- including the avoidance of arbitrary actions like ordering passengers out of cars for no good reason. It is a mistake to encourage police to provoke unnecessary conflicts with mistaken assumptions about what is good police work and what is not.

Arguments for expanding police discretion often arise not out of the realties of police work, but from a desire to free the police from accountability, *i.e.*, to avoid compensating the victims of unnecessary and hence unreasonable police conduct. The reasoning is that if there is very broad discretion (no standards and no accountability), it will be harder to convince jurors and judges, fearful of crime and invested in trusting the police, that questionable police behavior is "unreasonable." In our adversary system, such advocacy is to be expected because it works in the short term. The problem is, however, that lack of accountability ends

up costing more in the long run.[10] The way police handle a routine traffic stop may seem like something that shouldn't make much difference; but it does. If for no other reason, one has to figure that eventually it will turn up on somebody's video tape.

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[10] Just the monetary costs of police misconduct are very large. *See, e.g.*, James G. Kolts & Staff, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT 26 (July, 1992) ("In less than three and one-half years, from January 1989 to the end of May 1992, the settlements and verdicts in all excessive-force cases against the Department totalled $15,492,971.85."); McGladrey & Pullen, *et al.*, COUNTY OF LOS ANGELES RISK MANAGEMENT AND LIABILITY COST STUDY (July 30, 1993) at p. 19 *et seq.* (showing that legal defense costs equal or exceed settlements and verdicts); REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 56 (1991) ("From 1986 through 1990,
the City paid in excess of $20 million in judgments, settlements, and jury verdicts in over 300 lawsuits against LAPD officers alleging excessive use of force. This amount does not include the cost of defending these suits."); September 1, 1995 Los Angeles Daily Journal, *Verdicts & Settlements*, at page 4 (award of $15,954,161.00 to 36 plaintiffs against 23 Los Angeles County Sheriff's Deputies for false arrests and excessive force); September 15, 1995 Los Angeles Daily Journal, *Verdicts & Settlements*, at page 3 (award of $611,522 to 3 plaintiffs against, *inter alia*, Sheriff Sherman Block, Undersheriff Jerry Harper and former Undersheriff Robert Edmunds for deliberate indifference to the use of excessive force by Sheriff's deputies).

CONCLUSION

For the foregoing reasons, PMLRS, as *amicus curiae*, respectfully urges that the Court grant the petition for certiorari and issue the writ to the Ninth Circuit Court of Appeals.

Dated: January 31, 1996

Respectfully submitted,

Robert Mann, *Counsel of Record*
Donald W. Cook
3435 Wilshire Blvd., Suite 2900
Los Angeles, California 90010
Telephone: (213) 252-9444

Attorneys for *Amicus Curiae*
Police Misconduct Lawyers Referral Service